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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 991.

ALFONSO SPINELLI,

Libellant-Petitioner,

against

ISTHMIAN STEAMSHIP COMPANY, a corporation,

Respondent,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondent.

BRIEF OF RESPONDENT, ISTHMIAN STEAMSHIP COMPANY, a corporation, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBERT P. HART,
Counsel for Respondent,
Isthmian Steamship Company,
a corporation,
120 Broadway,
New York, N. Y. 10005

RALPH C. KREIMER,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York, N. Y. 10006, U. S. A.

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OPINIONS BELOW.

The opinion of United States District Judge Edward C. McLean, dismissing the libel, is not reported. It is printed in Appellant's Appendix in the Court below.

The opinion of the Court of Appeals for the Second Circuit, is reported in 326 F. 2d 870, and is printed in Petitioner's Appendix A.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit, affirming the decree of the District Court dismissing

the libel, was entered on January 13, 1964. It is set forth in Petitioner's Appendix B.

It is not disputed that the jurisdiction of this Court is invoked by virtue of 28 U. S. Code, Sections 1254 (1) and 2101 (c).

Question Presented.

Whether or not an accident to a longshoreman caused by the negligent use of vessel's equipment which is reasonably fit for its intended purpose renders the vessel unseaworthy.

Statement of Case.

Petitioner, a longshoreman employed by respondent International Terminal Operating Co., Inc., was injured while loading steel pipes aboard the SS *Steel Maker* at the Erie Basin Terminal, Brooklyn, New York, on September 17, 1957. On that day, petitioner and his co-employees were loading large loose steel pipes aboard said vessel. Petitioner was a dock man who assisted in making up drafts of pipe. The pipes weighed from a minimum of 1005 pounds to a maximum of 1400 pounds each. A draft consisted of six or seven pipes. Petitioner and his fellow longshoremen were working for three to three and one-half hours and experienced no difficulty in raising the drafts of pipe being taken aboard the vessel. Shortly before 11:30 P.M. one of the foremen for respondent International Terminal Operating Co., Inc., ordered petitioner and the other longshoremen, over their protests that the winch could not hold the extra pieces of pipe, to put two extra pipes on the draft. Two drafts of nine pieces of pipe were taken aboard the vessel without incident. On the third draft containing extra pipes, the winch took the load up

about three or four feet when it suddenly came down and petitioner was injured when one pipe rolled across his left foot.

At the completion of the trial the Judge made the following specific findings of fact and conclusions of law:

"I find the facts to be as follows:

1. The brake did not slip after the accident when the loads were reduced to 7 shorter pipes.

2. Ferraiola did not report any slipping to the night mate.

3. The brake on the winch was not repaired at any time on the night of September 17-18, 1957.

4. The winch and the brake were not defective, but were in good condition and were reasonably adequate appliances when used in a proper manner as they were intended to be used.

5. The brake slipped not because of any defect in the brake or winch but because the draft in question was too heavy for the brake as it was set.

6. The winch and brake were not used in a proper manner as they were intended to be used.

7. The loading of the pipes and the operation of the winch were under the sole control of ITO.

8. The winch was overloaded because the ITO foreman insisted that nine pipes be placed in the draft.

9. In so doing, despite the protest of plaintiff and other longshoremen, the ITO foreman failed to use the care which a reasonably prudent man would exercise under the circumstances.

10. The employees of the shipowner had no notice, actual or constructive, of the improper use of the winch by the longshoremen or of the accident.

11. The overloading of the winch was the sole cause of the slipping of the brake and the sole cause of the accident and the injury to plaintiff.

Upon these findings, I conclude as follows:

1. The shipowner was not negligent.

2. The ship was not unseaworthy. On this point I may say that I do not believe that the cases have as yet reached the point of holding that a vessel is unseaworthy merely because one of its appliances fails when it is used by a stevedore in a manner for which it was not designed or intended. I do not understand that *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423 (1959), relied upon by libellant, so holds. In that case, the negligent operation of the stevedore "did no more than bring into play the unseaworthy condition of the vessel" which had previously existed. Here there was no such previously existing unseaworthy condition.

3. ITO was negligent.

4. The negligence of ITO was the sole cause of the accident and of plaintiff's injury."

Reasons for Denying Writ.

At the outset of the argument setting forth the reasons why the Writ should be granted, it is contended that the decision of the Court of Appeals for the Second Circuit concerning the instant case is in error and not in accord with the decisions of this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959) and *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

When analyzed in the light of their own particular facts, neither *Crumady* nor *Mitchell*, is in conflict with the decision reached by the District Court and the affirmance by

the Court of Appeals in the case at hand. In *Crumady*, the Supreme Court held that a vessel was liable where the stevedoring company overloaded a boom, causing a *pre-existing unseaworthy condition to come into play.* In other words, the instrumentality in *Crumady* was not inherently defective but had previously been adjusted in a way that made it unsafe and dangerous for the work at hand and, therefore, unseaworthy. In *Spinelli* (the case at bar), no such underlying unseaworthy condition existed. In fact, there was an express finding by the District Court that the winch was in sound condition and reasonably fit when used in a proper manner. Hence, the finding of the District Court below comes squarely within the teachings of *Mitchell* v. *Trawler Racer, Inc., supra,* where Mr. Justice Stewart, delivering the majority opinion of this Court, said, at page 550:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service. *Boudoin* v. *Lykes Bros. SS Co.*, 348 U. S. 336."

The language by Mr. Justice Stewart is unmistakable: "The standard is not perfection, but reasonable fitness . . .". If the mere happening of an injury was sufficient to raise the concept of unseaworthiness, the standard would be not reasonable fitness but that of perfection and the owner would be obligated to furnish an accident-free vessel. See also *Titus* v. *Santorini*, 258 F. 2d 352 (9 Cir. 1958); *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 215 (2

Cir. 1961); *Mosley* v. *Cia. Mar. Adra., S. A.*, 314 F. 2d 223 (2 Cir. 1963), cert. den. 375 U. S. 829 (1963).

The concept of unseaworthiness is a relative one. As petitioner alleges, "It is not the time that the condition exists which is the significant factor; it is the distinct status of the condition".

As Judge Learned Hand said in *Grillea* v. *United States*, 232 F. 2d 919 (2 Cir. 1956), at page 922:

> "* * * each case must turn on its particular circumstances . . .".

The rule for determining unseaworthiness does not change by reason of a temporary condition as opposed to a permanent one. All concepts of unseaworthiness being divorced from those of negligence, the fact remains that a vessel and its equipment is seaworthy provided it was otherwise reasonably safe and suitable and fit for the intended use. *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. den. 368 U. S. 836 (1961).

As observed by Mr. Justice Stewart in *Morales* v. *City of Galveston et al.*, 370 U. S. 165 (1962), an unseaworthy condition *might* arise from any number of individualized circumstances. However, such observation is not a direction by the Court that because a stevedore or its employees used equipment in a manner for which it was never intended to be used, that a finding of unseaworthiness *must* be made.

There is no gainsaying the fact that a stevedore's breach may create an unseaworthy condition or may activate a ship's pre-existing unseaworthy condition. *Crumady* v. *The Joachim Hendrick Fisser, supra.* However, an examination of those cases in support of the petition shows that where there has been a holding of unseaworthiness, such unseaworthiness was found to exist as a matter of fact, or, as the various Courts of Appeals have declared, the factual

issue should have been submitted to a jury for determination.

In *Rich* v. *Ellerman & Bucknall S. S. Co.*, 278 F. 2d 704 (2 Cir. 1960), the charge to the jury was such as to preclude the jury from finding that the stowage of cargo was such as to create an unseaworthy condition as a matter of *fact*. It appears that in *Rich* a dangerous working platform consisting of automobile chasses had been left in a dangerous condition by the stevedores for a substantial period of time. Based on the facts as they existed in *Rich* a jury could have concluded that the vessel was unseaworthy.

Vega v. *The Malula*, 291 F. 2d 415 (5 Cir. 1961) is no support for the petition. In *Vega* a sheave fell out of a cargo block when the pin unaccountably slipped out of the sheave. Unlike the case at bar, in *Vega* at the time of the accident *the block was being used for a normally expected purpose* and there was absolutely no question involved in that case concerning improper use of the block at the time of the accident. Hence, the Court was justified in labelling this as a "classic case of patent unseaworthiness".

The Benjamin Noble, 244 Fed. 95 (6 Cir. 1917), is also without pertinency. In that case, the entire vessel was overloaded and thus caused to founder and sink. It is well known that in early days shipowners took advantage in loading their vessels beyond capacity to function in normal sea conditions. Hence, many a vessel was lost because of this attempt to carry more than the vessel could reasonably hold. Such former practice led to the passage of the Load-line Statute, 46 U.S.C.A., Secs. 85-85(g); for coastwise vessels, 46 U.S.C.A., Secs. 88-88(i). Can there be any doubt that a foundering vessel is unseaworthy?

It is abundantly clear that where the Court spoke of overloading a vessel thus rendering her unseaworthy, as

referred to in *Benjamin Noble, supra,* and affirmed in *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334 (1919), the Courts were referring to entire vessels which were overloaded and thus rendered unseaworthy, not a particular portion of a vessel which was reasonably fit for its intended use but was otherwise misused by the stevedore. Nor does respondent, Isthmian, deny that an unsecured wooden spreader which fell and struck the plaintiff was in unseaworthy condition, *Ballwanz* v. *Isthmian Lines, Inc.*, 319 F. 2d 457 (4 Cir. 1963), cert. den. April 6, 1964; or that a longshoreman may recover when he is injured as the result of unloading improperly stowed cargo, *Gindville* v. *American-Hawaiian Steamship Company*, 224 F. 2d 746 (3 Cir. 1955); or that an improperly rigged hawser which jumps out of a chock when it is not supposed to may constitute unseaworthiness, *Oddenes* v. *Universe Tankships, Inc.*, 188 F. Supp. 117 (S.D.N.Y. 1960). However, as indicated previously, where there has been a finding of unseaworthiness it has been because of an underlying defective condition in the instrumentality used. It is submitted there is no such finding in the case at bar. In fact, the case at hand does not deal with improper stowage; it is concerned solely with the misuse of good equipment by the stevedore.

Petitioner contends that the decision of the Court of Appeals for the Second Circuit in the instant matter is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964), and also with the decision of the Court of Appeals for the Third Circuit in *Ferrante* v. *Swedish American Lines*, decided April 16, 1964, F. 2d . This is clearly not so.

The petitioner states that in the *Scott* case the Fourth Circuit Court held that an unseaworthy condition may be

created by "the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation": It is obvious from reading *Scott* that the Fourth Circuit clearly held that the stevedore's method of operation may create a *factual issue* as to whether an unseaworthy condition was created for which the shipowner is liable to the injured longshoreman. However, because of the Trial Court's misleading special interrogatory and its erroneous instructions to the jury in *Scott*, the factual issue of unseaworthiness was never determined by it. The Fourth Circuit said, (pp. 125, 126):

> "In this Circuit it is no longer open to question that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation may present a *factual issue* as to whether an unseaworthy condition is created for which the shipowner may be held liable for injury to a longshoreman resulting from such condition." (Emphasis supplied.)

Such holding is in complete accordance with *Puddu* v. *Royal Netherlands Steamship Co.*, 303 F. 2d 752 (2 Cir. 1962), cert. den. 371 U. S. 840 (1962), which petitioner admittedly recognizes was a case which turned on the finding that the question of unseaworthiness was a factual question (Petition, page 13).

In the instant case there was no such error as was committed in the *Scott* case because the Judge below was not only the trier of the law but also the trier of the facts. Judge McLean found *as a matter of fact*, upon conflicting evidence, that the winch ". . . was in sound condition, reasonably fit for its intended use and . . . would not have failed if it had been properly used. This is the explanation I adopt. . . ".

Can it be suggested that if the case at bar had been tried to a jury rather than to a judge and the jury found that the vessel was seaworthy, such a jury finding would be any the less binding than that of the District Judge who heard all the witnesses and saw all the evidence presented?

Petitioner also alleges a conflict exists with the Third Circuit by reason of the case of *Ferrante* v. *Swedish American Lines, supra.* The purported inconsistency which the *Ferrante* case interjects into this issue is, not with other Circuits, but is rather with other cases in the Third Circuit itself, and is based primarily upon misinterpretation of the case of *Knox* v. *United States Lines,* 294 F. 2d 354 (3 Cir. 1961), and also the case of *Scott* v. *Isbrandtsen Co., Inc., supra.*

In the *Ferrante* case, the District Court, sitting in Admiralty, found that the negligence of the stevedore in using an allegedly faulty method to discharge a ship's cargo did not make the ship unseaworthy or the shipowner negligent. The libelants appealed, contending that the District Court's fact findings were "clearly erroneous" because they were the end result of the failure to apply proper legal standards. In its opinion of April 16, 1964, the Third Circuit cites the case of *Knox* v. *United States Lines Company, supra,* stating that in the *Knox* case there had been a jury finding that the stowage was seaworthy prior to the commencement of the stevedore's breaking-down operation. It then compared such a jury finding to the situation existing in *Ferrante* where it was undisputed that the ship's equipment—manila rope—was fit for its intended use. The Court concluded therefrom:

> "... Unless a valid distinction can be drawn between a stevedore's *unsafe* breaking-down of a seaworthy stowage and its negligent (unsafe) use

> of a ship's equipment, a logical projection of our holding in Knox would seem to indicate our subscription to the view that a stevedore's negligent or unsafe use of a ship's seaworthy equipment makes the ship unseaworthy." (Emphasis supplied.)

This conclusion is not only an incorrect statement of the Third Circuit's holding in the *Knox* case, but is, in addition, a conclusion based on the improper assumption that the stevedore's break-down in *Knox* was unsafe. This was the very issue, the unanswered question of fact, which prompted the reversal by the Third Circuit of the Trial Court in the *Knox* case. Indeed, in the *Knox* case itself, the Court discusses at length the conflicting evidence presented at the trial, including the opinions of expert stevedores, as to whether or not the breaking-down was dangerous or unsafe. Then, the Court in *Knox* concluded as follows (p. 358):

> "Under the Mitchell doctrine the evidence here created a jury question as to whether the seven or eight foot 'V' dug out in the stowage by the longshoremen constituted an unseaworthy condition."

It is perfectly obvious that at no time did the Third Circuit in *Knox* hold that the stevedore's breaking-down of the seaworthy stowage was unsafe. It clearly held that this was a factual question for a jury to determine. It follows that the aforementioned quoted conclusion from the *Ferrante* decision is erroneous and no such projection of *Knox* is indicated.

Moreover, the Third Circuit also makes the following fallacious notation in the *Ferrante* decision:

> "It compels notation that the Court of Appeals for the Fourth Circuit in Scott *v.* Isbrandtsen Company, Inc., 327 F. 2d 113 (1964) has construed *Knox*

> as holding that a longshoreman's negligent method of discharging cargo makes the ship unseaworthy . . ."

It is obvious that *Scott* held no such thing. Indeed, the very quotation from *Scott*, which is quoted in the *Ferrante* decision, holds that evidence of the negligence of the longshoremen themselves in the performance of the ship's work and in their method of operation may present *a factual issue* as to whether an unseaworthy condition is created.

In *Scott supra*, the Fourth Circuit specifically stated its surprise (p. 126) that the defendant therein had cited *Knox* in support of its contention that no factual issue of unseaworthiness arises from a longshoreman's alleged negligent method of discharging the ship's cargo. The Court in *Scott* proceeded to discuss the *Knox* case, 294 F. 2d 354, as well as the re-trial of that case, 201 F. Supp. 131 (E. D. Pa. 1962), and also the second appeal to the Third Circuit, 320 F. 2d 247 (3 Cir. 1963). On the basis of its discussion of all of these cases, the Fourth Circuit in *Scott* concluded as follows (at p. 127):

> "Although the issues in these *Knox* cases were ultimately resolved by a factual determination as to proximate cause, the conclusion is inescapable that the Third Circuit recognized that there existed a question of fact, to be determined by the trier of fact, i.e., whether the longshoremen's negligent method of discharging the cargo, though unknown to the shipowner, created an unseaworthy condition."

It is interesting to note that upon the re-trial of the *Knox* case (201 F. Supp. 131), a jury trial was waived by stipulation of counsel in order to permit the District Court to decide the issues based on the record of the prior trial and further argument. The issues were limited to whether or not the stevedore's break-down of the cargo constituted

an unseaworthy condition, and to what extent, if any, the plaintiff was contributorily negligent. The District Court made thirteen specific findings of fact, one of which (#13) stated as follows:

> "At all times herein referred to the stowage, appurtenances and the ship itself was *reasonably safe for the uses and purposes for which it was intended* and for any work required to be done upon it, including discharge of cargo" (emphasis supplied).

From these findings of fact the District Court concluded (p. 134):

> "If we could conclude from this evidence that the creation of the 'V' made this ship unseaworthy, temporarily or permanently, then plaintiff should recover. But, in our opinion, the plaintiff has not carried the burden of proving the existence of such a condition under all the testimony submitted at the original trial.
>
> "Plaintiff seems to argue that when negligence exists and an accident occurs on board ship *a fortiori* unseaworthiness must be present: *This we cannot accept as a rule of law nor as a finding of fact under the proofs in this case*" (emphasis supplied).

Knox again appealed to the Court of Appeals for the Third Circuit (320 F. 2d 247), on the ground that the Trial Court's findings of fact were "clearly erroneous" under the rule of *McAllister* v. *United States*, 348 U. S. 19 (1954). After considering, for the second time, the conflicting evidence relating to unseaworthiness, the Third Circuit held as follows (p. 250):

> "The factual setting of the accident in this case is not that pertaining in the Mitchell case, *supra*. We are unable to find features of this case which would distinguish it from Donovan *v.* Esso Shipping

Co., 259 F. 2d 65 (3rd Cir. 1958), cert. den. 359 U. S. 907, 79 S. Ct. 583, 3 L. Ed. 2d 572 (1959), and Puddu *v.* Royal Netherlands Steamship Company, 303 F. 2d 752 (2nd Cir. 1962), cert. den. 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962)."

Thus, any confusion which may have resulted from the first *Knox* case in the Third Circuit (294 F. 2d 354) is now clearly resolved and any alleged conflict with the Second Circuit specifically rejected.

Petitioner argues that in *Puddu* v. *Royal Netherlands Steamship Company, supra* the finding of the question of unseaworthiness was a factual issue while in the instant case the issue was a legal issue and allegedly was so regarded by the Trial Judge. It would appear from a comparison of the present case with *Puddu* that the issues are remarkably similar. In each case there was nothing wrong with the vessel's equipment. It was merely misused by the stevedore. As a matter of fact, the case at hand is even stronger than *Puddu*. In *Puddu*, equipment broke and had to be replaced because of the negligence of the longshoremen. In the case at bar no repairs were necessitated after the accident to petitioner; just as soon as the stevedores reduced the number of pieces of pipe in the draft the winch responded in the manner intended.

Petitioner further denies that we are here dealing with a situation of operational negligence such as the Court found in *Puddu*. It is submitted that it would be difficult to find a more classic example of that doctrine. The evidence submitted at the trial amply supported the findings of fact which the trial court made. It is well established that the shipowner's warranty of seaworthiness does not encompass the negligence by a stevedore or its employees in the use of seaworthy appliances. *Titus* v. *The Santorini*, 258 F 2d 352 (9 Cir. 1958); *Royal Mail Lines, Ltd.* v. *Peck*, 269 F.

2d 857 (9 Cir. 1959); *Billeci* v. *United States*, 298 F. 2d 703 (9 Cir. 1962); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65 (3 Cir. 1958), cert den. 359 U. S. 907; *Williams* v. *The SS Richard de Larrinaga*, 287 F. 2d 732 (4 Cir. 1961); *Puddu* v. *Royal Netherlands Steamship Company, supra*; *Seitz* v. *M. V. Captantonis*, 203 F. Supp. 723 (D.C.D. Ore. 1962).

Moreover, without a conviction that the accident happened because of a definite condition for which the shipowner was to blame, the trial court had no duty to find for the injured longshoreman. *Titus* v. *The Santorini, supra.* Whether a stevedore's negligent method of discharging the cargo created an unseaworthy condition is a question of fact to be determined by the trier of the facts. *Puddu* v. *Royal Netherlands Steamship Company, supra*; *Blier* v. *United States Lines Company*, 286 F. 2d 920 (2 Cir. 1961), cert. den. 368 U. S. 836 (1961); *Donovan* v. *Esso Shipping Co.*, 259 F. 2d 65 (3 Cir. 1958), cert. den. 359 U. S. 907; *Knox* v. *United States Lines Company*, 294 F. 2d 354 (3 Cir. 1961); *Knox* v. *United States Lines Company*, 320 F. 2d 247 (3 Cir. 1963); *Scott* v. *Isbrandtsen Co.*, 327 F. 2d 113 (4 Cir. 1964); *Ballwanz* v. *Isthmian Lines, Inc.*, 319 F. 2d 457 (4 Cir. 1963), cert. den. April 6, 1964, U. S. ; *Provenza* v. *American Export Lines, Inc.*, 324 F. 2d 660 (4 Cir. 1963); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481 (4 Cir. 1960).

Conclusion.

The decision of the Court of Appeals for the Second Circuit in the instant case is entirely in accord with the decision of this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959), and *Mitchell* v. *The Trawler Racer, Inc.*, 362 U. S. 539 (1960). The facts of the instant case lie squarely within, and are governed by, the

doctrine set forth in the case of *Puddu* v. *Royal Netherlands Steamship Co., supra.*

There exists no conflict among the United States Courts of Appeal for the Second, Third and Fourth Circuits on the issue presented herein.

The petition should be denied in all respects.

Respectfully submitted,

ROBERT P. HART,
Counsel for Respondent Isthmian Steamship Company.

RALPH C. KREIMER,
Of Counsel.